



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 217, and 252

[Docket DARS-2022-0026]

RIN 0750-AL22

Defense Federal Acquisition Regulation Supplement:

Undefinitized Contract Actions (DFARS Case 2021-D003)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) as recommended by the DoD Inspector General to refine the management of undefinitized contract actions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2021-D003, using any of the following methods:

- o Federal eRulemaking Portal: <https://www.regulations.gov>. Search for "DFARS Case 2021-D003." Select "Comment" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2021-D003" on any attached documents.

o Email: *osd.dfars@mail.mil*. Include DFARS Case 2021-D003 in the subject line of the message.

Comments received generally will be posted without change to *<https://www.regulations.gov>*, including any personal information provided. To confirm receipt of your comment(s), please check *<https://www.regulations.gov>*, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement recommendations to refine management of undefinitized contract actions (UCAs) as addressed in the DoD Inspector General Audit of Military Department Management of Undefinitized Contract Actions (Report No. DODIG-2020-084). This report recommends changes to the DFARS to encourage contractors to provide timely qualifying proposals, including the possibility of the Government withholding a percentage of payments yet to be paid under a UCA until it receives a qualifying proposal from the contractor.

This proposed rule reinforces the contracting officer's existing authority, notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization, to withhold up to 5 percent of all subsequent financing requests or take other appropriate actions when the contractor does not submit

qualifying proposals in accordance with the contract definitization schedule. DoD contracting officers will appropriately document contract files and apply contract risk factors on DD Form 1547, Record of Weighted Guidelines, under this proposed rule.

II. Discussion and Analysis

DFARS 215.404-71-3, Contract type risk and working capital adjustment, generally regards the contract type risk to be in the low end of the designated range when costs have been incurred prior to definitization. This proposed rule adds, at 215.404-71-3, paragraph (d)(2)(i), that when considering the reduced cost risks associated with allowable incurred costs on an undefinitized contract action, it is appropriate to apply separate contract risk factors for allowable incurred costs and estimated costs to complete when completing the contract risk factors section of DD Form 1547, Record of Weighted Guidelines.

DFARS subpart 217.74 prescribes policies and procedures for the management and oversight of undefinitized contract actions and related approval requirements. DFARS 217.7404-3(b) currently states that if the contractor does not submit a timely qualifying proposal, the contracting officer may suspend or reduce progress payments or take other appropriate action. This proposed rule revises the withholding guidance to specify "an amount necessary to protect the interests of the Government, not to exceed 5 percent of all subsequent financing requests," if the qualifying proposal is not submitted in accordance with the

contract definitization schedule. This proposed rule provides examples of other appropriate actions to include documenting the noncompliance in the contractor's past performance evaluation or terminating the contract for default. This proposed rule adds that contracting officers must ensure contract files are documented with justification for withholding or not withholding payments when the qualifying proposal was not submitted in accordance with the contract definitization schedule.

This proposed rule adds to the clause at DFARS 252.217-7027, Contract Definitization, that failure to meet the qualifying proposal date in the contract definitization schedule could result in the Government withholding an amount of up to 5 percent of all subsequent requests for financing until the contracting officer determines that a proposal is qualifying.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule amends the clause at DFARS 252.217-7027, Contract Definitization. However, this rule does not impose any new requirements on contracts at or below the SAT or for commercial services or commercial products, including COTS items. The clause will continue to not apply to acquisitions at or below the SAT and to acquisitions of commercial services and commercial products, including COTS items.

IV. Expected Impact of the Rule

The proposed rule will incentivize contractors to submit qualifying proposals according to the contract definitization schedule to avoid the withholding of an amount of up to 5 percent of all subsequent financing requests. DoD contracting officers will be required to consider applying separate and differing contract risk factors to costs incurred and estimated costs to complete, when completing the DD Form 1547, Record of Weighted Guidelines. Contracting officers will also be required to document the contract file to show justification for withholding or not withholding a portion of financing payment when the qualifying proposal was not submitted according to the contract definitization schedule.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because no additional administrative burdens will be placed on small entities. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) as recommended by the DoD Inspector General Audit of Military Department Management of Undefinitized Contract Actions (Report No. DODIG-2020-084) to refine the management of undefinitized contract actions. This report recommends changes to the DFARS to encourage contractors to provide timely qualifying proposals, including the possibility of the Government withholding a percentage of

payments yet to be paid under an undefinitized contract action until it receives a qualifying proposal from the contractor.

This proposed rule incentivizes contractors to submit qualifying proposals in accordance with the contract definitization schedule; and, notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization, allows contracting officers to withhold an amount necessary to protect the interests of the Government, not to exceed 5 percent of all subsequent financing requests, or take other appropriate actions if a qualifying proposal is not submitted in accordance with the contract definitization schedule. Contracting officers will document in the contract file the justification for withholding or not withholding payments if the qualifying proposal was not submitted in accordance with the contract definitization schedule. This proposed rule clarifies that, when considering the reduced cost risks associated with allowable incurred costs on an undefinitized contract action, it is appropriate to apply separate and differing contract risk factors for allowable incurred costs and estimated costs to complete when documenting the contract risk sections of DD Form 1547, Record of Weighted Guidelines.

The objective of the proposed rule is to implement the recommendations of the DoD Inspector General. The legal basis for the rule is 41 U.S.C 1303.

This proposed rule will likely affect small entities that will be awarded undefinitized contract actions. Data was obtained

from the Procurement Business Intelligence Service (PBIS) for all contracts and modifications containing DFARS clause 252.217-7027, Contract Definitization. Data from PBIS revealed DoD awarded a total of 2,162 contracts to 971 small businesses from fiscal year 2019 through fiscal year 2021, which averages out to 324 small businesses per year. Therefore, this proposed rule may apply to approximately 324 unique small entities.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact on small entities, because this proposed rule is not expected to have a significant impact on small entities.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2021-D003), in correspondence.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of

Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 215, 217, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215, 217, and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 215, 217, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

2. Amend section 215.404-71-3 by revising paragraph (d) (2) (i) to read as follows:

215.404-71-3 Contract type risk and working capital adjustment.

* * * * *

(d) * * *

(2) * * *

(i) The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (also see 217.7404-6(a) and 243.204-70-6). When considering the reduced cost risks associated with allowable incurred costs on an undefinitized contract action, it is appropriate to apply separate contract risk factors for allowable incurred costs and estimated costs to complete when completing the contract risk sections of DD Form 1547, Record of Weighted

Guidelines. When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs has been incurred prior to definitization, the contracting officer may assign a value as low as zero percent, regardless of contract type. However, if a contractor submits a qualifying proposal to definitize an undefinitized contract action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal as defined in 217.7401, the profit allowed on the contract shall accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

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PART 217—SPECIAL CONTRACTING METHODS

3. Amend section 217.7404-3 by revising paragraph (b) to read as follows:

217.7404-3 Definitization schedule.

* * * * *

(b)(1) Submission of a qualifying proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a qualifying proposal in accordance with the contract definitization schedule, notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization, the contracting officer may withhold an amount necessary to protect the interests of the Government, not to exceed

5 percent of all subsequent financing requests, or take other appropriate actions (e.g., documenting the noncompliance in the contractor's past performance evaluation or terminating the contract for default).

(2) Contracting officers shall document in the contract file the justification for withholding or not withholding payments if the qualifying proposal was not submitted in accordance with the contract definitization schedule.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Revise section 252.217-7027 to read as follows:

252.217-7027 Contract definitization.

As prescribed in 217.7406(b), use the following clause:

CONTRACT DEFINITIZATION (DATE)

(a) A _____ [*insert specific type of contract action*] is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include—

(1) All clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the undefinitized contract action;

(2) All clauses required by law on the date of execution of the definitive contract action; and

(3) Any other mutually agreeable clauses, terms, and conditions.

(b) The Contractor agrees to submit a _____ [*insert type of proposal; e.g., fixed-price or cost-and-fee*] proposal and

certified cost or pricing data supporting its proposal.

Notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization, failure to meet the qualifying proposal date in the contract definitization schedule could result in the Contracting Officer withholding an amount up to 5 percent of all subsequent requests for financing until the Contracting Officer determines that a proposal is qualifying.

(c) The schedule for definitizing this contract action is as follows *[insert target date for definitization of the contract action and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of the make-or-buy and subcontracting plans and certified cost or pricing data]*:

(d) If agreement on a definitive contract action to supersede this undefinitized contract action is not reached by the target date in paragraph (c) of this clause, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with FAR subpart 15.4 and part 31, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with

completion of the contract, subject only to the Limitation of Government Liability clause.

(1) After the Contracting Officer's determination of price or fee, the contract shall be governed by—

(i) All clauses required by the FAR on the date of execution of this undefinitized contract action for either fixed-price or cost-reimbursement contracts, as determined by the Contracting Officer under this paragraph (d);

(ii) All clauses required by law as of the date of the Contracting Officer's determination; and

(iii) Any other clauses, terms, and conditions mutually agreed upon.

(2) To the extent consistent with paragraph (d)(1) of this clause, all clauses, terms, and conditions included in this undefinitized contract action shall continue in effect, except those that by their nature apply only to an undefinitized contract action.

(e) The definitive contract resulting from this undefinitized contract action will include a negotiated _____ [*insert "cost/price ceiling" or "firm-fixed price"*] in no event to exceed _____ [*insert the not-to-exceed amount*].

(End of clause)